

6-16-1976

Mary Rose Wilson, Administrator of the Estate of Billy Joe Wilson v. John D. Wizer, d/b/a Star Dust Cocktail Lounge; Kentucky Workmen's Compensation Board; Frances Jones Mills, Treasurer of Commonwealth of Kentucky, as Custodian of Uninsured Employers' Fund

Appellee's Brief 1976-SC-0365

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# **APPELLEE'S BRIEF**

544 SW 2d 231

SUPREME COURT OF KENTUCKY

No. 76-365

MARY ROSE WILSON,  
Administrator of the  
Estate of Billy Joe Wilson

APPELLANT

V.

JOHN D. WIZOR, d/b/a  
STAR DUST COCKTAIL LOUNGE;  
KENTUCKY WORKMEN'S COMPENSATION  
BOARD; FRANCES JONES MILLS,  
Treasurer of Commonwealth of  
Kentucky, as Custodian of  
UNINSURED EMPLOYERS' FUND

APPELLEES

---

Appeal from Jefferson Circuit Court  
Common Pleas Branch,  
Second Division  
Judge Henry Hobson

---

BRIEF FOR APPELLEE

UNINSURED EMPLOYERS' FUND

---

FILED

ROBERT F. STEPHENS  
ATTORNEY GENERAL

JUN 16 1976

MARTHA LAYNE COLLINS  
CLERK  
SUPREME COURT

By: Roger P. Elliott  
Assistant Attorney General  
Counsel for Appellee,  
Frances Jones Mills, Treasurer  
Commonwealth of Kentucky, as  
Custodian of Uninsured Employers' Fund

This is to certify that copies of this Brief have been served on Hon. F. Thomas Conway, Suite 202, 310 W. Liberty Street, Louisville, Ky. 40202; Hon. William L. Hoge, III, 1112 Kentucky Home Life Building, Louisville, Ky. 40202; Hon. Joseph J. Golden, 610 Republic Building, Louisville, Ky. 40202; Hon. Henry Hobson, Judge, Jefferson Circuit Court, Common Pleas Branch, Second Division, Courthouse, Louisville, Ky. 40202; and Hon. Wm. L. Huffman, Director Workmen's Compensation Board, Capitol Plaza Tower, Frankfort, Ky. 40601, pursuant to RAP 1.250, this 16th day of June, 1976.

Roger P. Elliott

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STATEMENT OF THE QUESTION PRESENTED

WAS THERE PROBATIVE EVIDENCE OF RECORD AS WELL AS STATUTORY AND RULING CASE LAW TO SUSTAIN THE WORKMEN'S COMPENSATION BOARD AND THE JEFFERSON CIRCUIT COURT IN THEIR DISMISSAL OF THIS CLAIM?

FRANCES JONES MILLS ANSWERS IN THE AFFIRMATIVE.

SUPREME COURT OF KENTUCKY

No. 76-365

MARY ROSE WILSON,  
Administratrix of the  
Estate of Billy Joe Wilson

APPELLANT

V.

JOHN D. WIZOR d/b/a  
STAR DUST COCKTAIL LOUNGE:  
KENTUCKY WORKMEN'S COMPENSATION  
BOARD; FRANCES JONES MILLS,  
Treasurer of the Commonwealth  
of Kentucky, as Custodian of the  
UNINSURED EMPLOYERS' FUND

APPELLEES

---

Appeal from Jefferson Circuit Court

Honorable Henry Hobson, Judge

MAY IT PLEASE THE COURT:

Unless otherwise apparent or indicated throughout this Brief, numbers in parenthesis standing alone refer to pages in the original record of the Kentucky Workmen's Compensation Board. The appellant, Mary Rose Wilson is referred to as "appellant". The appellee, John D. Wizer, is referred to as "Wizer". The appellee, Kentucky Workmen's Compensation Board is referred to as "the Board". The appellee Frances Jones Mills is referred to as "the Fund".

STATEMENT OF THE CASE

(A) STATEMENT OF THE PROCEEDINGS.

The Uninsured Employers' Fund adopts the nature of proceedings set out in the appellant's brief.

(B) STATEMENT OF FACTS.

The Uninsured Employers' Fund adopts the statement of facts set out in appellee-employer Wizer's brief.

A R G U M E N T

THERE WAS PROBATIVE EVIDENCE OF  
RECORD AS WELL AS STATUTORY AND  
RULING CASE LAW TO SUSTAIN THE  
WORKMEN'S COMPENSATION BOARD AND  
THE JEFFERSON CIRCUIT COURT IN  
THEIR DISMISSAL OF THE CLAIM.

It is the contention of the appellee Fund that there was sufficient evidence in the record to substantiate the Board's finding of fact that the decedent was (1) employed by John Thomas Helm, the day bartender to work the day shift which ended at 5:00 P.M. when another bartender's shift started; (2) that the decedent was not an employee of appellee Wizer at the time of his death and his death was not work related; and (3) that the decedent was intoxicated at the time of his death and that his death was caused by his intoxication and his willful injury to the man who killed him. The Board's decision is not clearly erroneous and the Jefferson Circuit Court was correct in affirming it. It is a well established principle of Workmen's Compensation Law that judicial review of the findings of fact of the Workmen's Compensation Board is specifically limited to determining whether there is any evidence to support that finding. Hendricks V. Kentucky and Virginia Leaf Tobacco Company, Ky., 229 S.W.2d 953 (1950); Smyzer V. The B. F. Goodrich Chemicals, Ky., 474 S.W.2d 367 (1971); McCloud V. Beth-Elkhorn Corporation, Ky., 514 S.W.2d 46 (1947).

It matters not whether the Court agrees or disagrees with the Board's findings, so long as those findings are based on the facts of record on evidence of probative value. The Board is the finder of facts and its findings will not be disturbed on appeal. Thomson V. Kentucky Appalachian Industries, Inc., Ky. 451 S.W.2d 655 (1970).

In the interests of brevity, the appellee Fund respectfully directs the Court's attention to the brief for appellee Wizer and its excellent discussion of the sufficiency of the evidence supporting the findings of the Board. It is readily apparent that the greater part of the evidence before the Board is supportive of its Opinion and Award of September 22, 1975.

KRS 342.285 establishes the appellate jurisdiction of the Circuit Court when it is dealing with appeals from the Workmen's Compensation Board. This power of review is severely limited by KRS 342.285(3) which states:

No new or additional evidence may be introduced in the circuit court except as to the fraud or misconduct of some person engaged in the administration of this chapter and affecting the order, ruling or award, but the Court shall otherwise hear the cause upon the record as certified by the Board and shall dispose of the cause in summary manner. The Court shall not substitute its Judgment for that of the Board as to the weight of evidence on questions of fact, its review being limited to determining whether or not;

- (a) The Board acted without or in excess of its powers;
- (b) The order, decision or award was procured by fraud;
- (c) The order, decision, or award is not in conformity to the provisions of this chapter;
- (d) The order, decision, or award is clearly erroneous on the basis of the reliable, probative, and material evidence contained in the record; or
- (e) The order, decision, or award is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.



It is clear from this statute that the subject matter jurisdiction of the Circuit Court is very narrow. It is further fully clear that the facts are more than ample in the record to support each of the numerous basis upon which Workmen's Compensation Board rightfully refused plaintiff's compensation.

#### CIRCUIT COURT REVIEW

"It is elementary in compensation cases that in the absence of fraud or mistake a finding of fact by the Board is conclusive and will not be disturbed by the Courts, if supported by any competent evidence or probative value." C. Lee Cook Manufacturing Co. V. Hodges, et al., 304 Ky. 9, 199 S.W.2d 635 (1946), p. 636.

It should be noted that the evidence that supports the Board's findings does not have to preponderate. Black Mountain Corp. V. Epperson, 285 Ky. 661, 148 S.W.2d 1063 (1941).

Another key limitation on Circuit Court in Workmen's Compensation cases is that the Court does not have the power to determine the weight or credibility of the evidence. Abbott V. Grissom Rakestraw Lumber Co., Ky., 279 S.W.2d 227 (1955); Black Mountain Corp. V. Epperson, 285 Ky. 661, 148 S.W.2d 1063 (1941). Ireland V. Liberty Mutual Insurance Co., Ky., 462 S.W.2d 903 (1971). The evidence of defendants' is far more credible than plaintiff's proof. The point being made here is that the Board made a finding of fact that is not clearly erroneous, and is supported by the reliable testimony.

Because of these facts, the limited review allowed under KRS 342.285(3) and case law which protects the finding of the Board, when supported by any evidence, the appellant has failed to state a cause of action upon which this Court can grant relief.

The appellant seeks to reargue the facts of her claim before this Honorable Court. By mere editing of the total evidence, appellant hopes to persuade this Court that the Board's conclusion was unsupported. While dwelling on those small parts of evidence

which do support appellant's theory of the case, she has pointedly ignored the plurality of evidence, set out in appellee Wizer's brief, which support the Board's findings of fact.


The Board is the sole finder of fact in compensation proceedings, and when such facts are based on substantial probative evidence, they are conclusive and not subject to review by the Circuit Court or this higher Court. Yocum V. Pierce, Ky., 534 S.W.2d 581 (1976); Armco Steel Corporation V. Mullins, Ky., 501 S.W.2d 261 (1973); E. I. Dupont De Nemours Company V. Burns, Ky., 427 S.W.2d 581 (1968).

#### C O N C L U S I O N

The finding of fact by the Workmen's Compensation Board that the deceased was not an employee at the time of his death, and that his death was proximately caused by his intoxication and wilful intent to injure the man who killed him, is a determination solely within the discretion of that Board, since it is a fact finding body and its determination of fact will not be set aside when there is evidence of substance upon which to base such a finding.

The Opinion and Award of the Workmen's Compensation Board and the Judgment of the Jefferson Circuit Court should be affirmed by this Honorable Court.

Respectfully submitted,  
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